No. 15-5880

In the United States Court of Appeals for the Sixth Circuit

APRIL MILLER, PH.D; KAREN ANN ROBERTS; SHANTEL BURKE; STEPHEN NAPIER; JODY FERNANDEZ; KEVIN HOLLOWAY; L. AARON SKAGGS; AND BARRY SPARTMAN,
Plaintiffs-Appellees,

v.

KIM DAVIS, INDIVIDUALLY,
Defendant-Appellant.

ON APPEAL FROM THE U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY,
NO. 15-CV-0044-DLB (HON. DAVID L. BUNNING)

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF APPELLANT'S MOTION TO STAY DISTRICT COURT'S AUGUST 12, 2015 ORDER PENDING APPEAL

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INTRODUCTION

Pursuant to FED. R. APP. PROC. 27, Eagle Forum Education & Legal Defense Fund ("Eagle Forum") requests leave to file the accompanying *amicus curiae* brief in support of the defendant-appellant Clerk's motion for a stay pending appeal. The parties have all consented to this motion.[1]

IDENTITY, INTEREST AND AUTHORITY TO FILE

Since its founding in 1981, Eagle Forum has consistently defended traditional American values, including not only traditional marriage, defined as the union of husband and wife, but also the religious freedoms that were instrumental in this Nation's founding. Although the Supreme Court recently held that our "Constitution … does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex," even that Court acknowledged that the "First Amendment ensures that religious organizations and persons are given proper protection." *Obergefell v. Hodges*, 135 S.Ct. 2584, 2607 (2015). The litigation thus presents a new issue in this Circuit and nationally on how to balance the important interests at stake on all side. For the foregoing reasons, Eagle Forum has a direct and vital interest in the issues raised here.

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[1] Consistent with FED. R. APP. P. 29(c)(5), the undersigned counsel certifies that: counsel for *amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to this brief's preparation or submission.

AUTHORITY TO FILE EAGLE FORUM'S BRIEF

Motions for leave to file an *amicus* brief should explain the movant's interest and "the reason why an *amicus* brief is desirable and why the matters asserted are relevant to the disposition of the case." FED. R. APP. P. 29(b). The Advisory Committee Note to the 1998 amendments to Rule 29 explain that "[t]he amended rule [Rule 29(b)] … requires that the motion state the relevance of the matters asserted to the disposition of the case." The Advisory Committee Note then quotes Sup. Ct. R. 37.1 to emphasize the value of *amicus* briefs that bring a court's attention to relevant matter not raised by the parties:

> An *amicus curiae* brief which brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties is of considerable help to the Court.

Id. (*quoting* Sup. Ct. R. 37.1).

As now-Justice Samuel Alito wrote while serving on the U.S. Court of Appeals for the Third Circuit, "I think that our court would be well advised to grant motions for leave to file *amicus* briefs unless it is obvious that the proposed briefs do not meet Rule 29's criteria as broadly interpreted. I believe that this is consistent with the predominant practice in the courts of appeals." *Neonatology Assocs., P.A. v. Comm'r*, 293 F.3d 128, 133 (3d Cir. 2002) (citing Michael E. Tigar and Jane B. Tigar, *Federal Appeals – Jurisdiction and Practice* 181 (3d ed. 1999) and Robert L. Stern, *Appellate Practice in the United States* 306, 307-08 (2d ed.

1989)). Now-Justice Alito quoted the Tigar treatise favorably for the statement that "[e]ven when the other side refuses to consent to an *amicus* filing, most courts of appeals freely grant leave to file, provided the brief is timely and well-reasoned." 293 F.3d at 133.

FILING THE EAGLE FORUM'S BRIEF WILL SERVE THE COURT'S RESOLUTION OF THE ISSUES RAISED

The Eagle Forum brief will aid the Court in resolving the issues of first impression presented in this appeal and in determining whether to stay the District Court's ruling until this Court can determine the appropriate balancing of the important constitutional rights asserted by the respective parties. In particular, the Eagle Forum brief covers two important issues that the defendant-appellant did not address in her motion but which this Court can or even must consider.

First, Eagle Forum argues that – because the balancing test for weighing a county clerk's religious-freedom rights against a couple's right to a marriage license is unclear, federal courts can incorporate the standards from the Kentucky Religious Freedom Restoration Act, KY. REV. STAT. §446.350 ("Kentucky RFRA"), into the county clerk's federal claims under 42 U.S.C. §1988(a). Because the clerk presses Kentucky RFRA, the arguments that the Eagle Forum brief makes under 42 U.S.C. §1988(a) are available to her, even if she did not argue precisely the same facet of the issue in her motion. *Yee v. City of Escondido,* 503 U.S. 519, 534-35 (1992).

Second, Eagle Forum argues that county clerks in Kentucky share the state's sovereign immunity under the Eleventh Amendment, which is sufficiently in the nature of jurisdictional argument for the clerk to raise it for the first time on appeal. *Edelman v. Jordan*, 415 U.S. 651, 678 (1974). The asserted basis for suing the clerk is that her refusal to provide marriage licenses violates federal law as laid down in *Obergefell*, but the clerk has denied marriage licenses to both same-sex and opposite-sex couples (*i.e.*, equally to everyone), which cannot violate the Equal Protection Clause. *Heckler v. Mathews*, 465 U.S. 728, 740 (1984). Similarly, neither this Court nor the Supreme Court has ever found a due-process right to obtain marriage licenses in one's county of residence, especially when marriage licenses are readily available nearby. Without an ongoing violation of federal law, the plaintiffs-appellees cannot make out a case against a government officer like a county clerk. *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002). Without an exception to sovereign immunity, this Court must remand with orders to dismiss this litigation. Finally, if the Court entered judgment without resolving the immunity issues that the Eagle Forum brief raises, the county clerk could collaterally challenge any relief. *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 152-53 & n.6 (2009). As a result, not only judicial economy but also the needs to assure itself of the Article III redressability that underlies any relief compel this Court to consider these issues.

CONCLUSION

The Court should grant Eagle Forum leave to file its *amicus* brief.

Dated: August 21, 2015

Respectfully submitted,

/s/ Lawrence J. Joseph

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CERTIFICATE OF SERVICE

I hereby certify that, on August 21, 2015, I electronically filed the foregoing motion for leave to file – together with the accompanying brief – with the Clerk of the Court for the U.S. Court of Appeals for the Sixth Circuit by using the Appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Dated: August 21, 2015

Respectfully submitted,

/s/ Lawrence J. Joseph

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BRIEF FOR *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF APPELLANT'S MOTION TO STAY DISTRICT COURT'S AUGUST 12, 2015 ORDER PENDING APPEAL

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 15-5880 Case Name: Miller v. Davis

Name of counsel: Lawrence J. Joseph

Pursuant to 6th Cir. R. 26.1, Eagle Forum Education & Legal Defense Fund
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on August 21, 2015 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Lawrence J. Joseph

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Eagle Forum Education & Legal Defense Fund ("Eagle Forum"), a nonprofit corporation, submits this *amicus* brief in support of the appellant's stay application with the accompanying motion for leave to file.[1] Since its founding in 1981, Eagle Forum has consistently defended traditional American values, including not only traditional marriage, defined as the union of husband and wife, but also the religious freedoms that were instrumental in this Nation's founding. Although the Supreme Court recently held that our "Constitution … does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex," even that Court acknowledged that the "First Amendment ensures that religious organizations and persons are given proper protection." *Obergefell v. Hodges*, 135 S.Ct. 2584, 2607 (2015). The litigation thus presents a new issue in this Circuit and nationally on how to balance the important interests at stake on all side. For the foregoing reasons, Eagle Forum has a direct and vital interest in the issues raised here.

STATEMENT OF THE CASE

Plaintiffs are same-sex and opposite-sex couples (the "Couples") residing in

[1] Consistent with FED. R. APP. P. 29(c)(5), the undersigned counsel certifies that: counsel for *amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to this brief's preparation or submission.

Rowan County, Kentucky, who wish to obtain marriage licenses. The defendant is the Rowan County Clerk (the "Clerk"), whom Kentucky law authorizes to issue marriage licenses. In its current configuration, Kentucky's marriage-license form would require the Clerk to violate her faith if she issued a marriage license bearing her name and imprimatur for a same-sex marriage, and she has filed a third-party complaint against appropriate Kentucky officials to achieve an accommodation of all parties' rights under which the Couples could obtain marriage licenses without a violation of the Clerk's religious-freedom rights.

In the meantime, the Clerk has ceased dispensing marriage licenses to anyone, consistent with the *Obergefell* holding that the "Constitution … does not permit the State to bar same-sex couples from marriage on the *same terms* as accorded to couples of the opposite sex." 135 S.Ct. at 2607 (emphasis added). Under Kentucky law, however, the Couples are free to obtain marriage licenses at more than 100 locations elsewhere in the state, KY. REV. STAT. §402.080, including the two metropolitan areas to which the Couples have travelled to attend proceedings before the District Court below. *See* Stay Appl. at 3 (60 miles to Ashland and 100 miles to Covington).[2] The Couples' traveling those distances does not appear to have presented a significant burden.

[2] Catlettsburg (the county seat of Boyd County) is in the Huntington-Ashland-Ironton metropolitan area, and Covington is a county seat of Kenton County.

SUMMARY OF ARGUMENT

Although the Couples demand their rights under *Obergefell*, this litigation requires the Court to balance the Couples' asserted marriage rights with the Clerk's free-exercise rights. Because neither this Court nor the Supreme Court have set the appropriate test for weighing these competing rights (Section I.A), federal law is therefore "deficient … to furnish suitable remedies" within the meaning of 42 U.S.C. §1988(a). Under the circumstances, a federal court evaluating this conflict in Kentucky can and should look to the Kentucky Religious Freedom Restoration Act, KY. REV. STAT. §446.350 ("Kentucky RFRA"), to balance these interests (Section I.B).

In Kentucky, the county clerk is a constitutional office that enjoys sovereign immunity from suit in federal court under the Eleventh Amendment (Section II.A.1.). No decision of the Supreme Court or this Court has ever addressed – much less found – a constitutional right to obtain a marriage license in one's county of residence, particularly where marriage licenses are readily available elsewhere and nearby in the state. Moreover, the Clerk here ceased providing marriage licenses to anyone, thereby ensuring the equal treatment that *Obergefell* mandates. Under the circumstances, there is no ongoing violation of federal law (Section II.A.2.), which is a precondition for sidestepping sovereign immunity under the *Ex parte Young* exception to sovereign immunity (Section II.A). Because

the Clerk may raise her immunity not only for the first time on appeal but also collaterally even after an adverse judgment, this Court must consider her immunity in deciding the stay application to ensure it has jurisdiction and can issue an order that provides redress (Section II.B.).

ARGUMENT

Amicus Eagle Forum fully supports the Clerk's religious-freedom arguments but writes separately in the abbreviated briefing of her stay application to make two primary points that this Court can consider at this stage and on the merits. First, this Court can and should rely on Kentucky RFRA to balances the parties' respective interests here under 42 U.S.C. §1988(a). Second, the Clerk is immune from suit under the Eleventh Amendment.

I. THE DISTRICT COURT DID NOT PROPERLY BALANCE THE CLERK'S RELIGIOUS-FREEDOM RIGHTS WITH THE COUPLES' MARRIAGE RIGHTS

The same-sex plaintiffs driving this litigation impatiently assert their new rights under *Obergefell* and thus frame this litigation exclusively as the denial of *their* rights. Even when viewed in the light most favorable to the Couples, however, *amicus* Eagle Forum respectfully submits that this litigation requires the *balancing of competing rights.*[3] Moreover, in the context of balancing the competing federal rights at issue, federal civil rights law provides for looking to

[3] As explained in Section II.A.2., *infra*, *amicus* Eagle Forum respectfully submits that the Couples do not, in fact, have a federal right to assert here.

state laws such as Kentucky RFRA when federal law itself does not provide a framework for striking the right balance.

A. No Precedent of this Court or the Supreme Court Expressly Provides a Balancing Test for the Two Rights at Issue Here

Although the Couples emphasize that the Clerk is a public officer, we are long past the era of Justice Holmes' famous dictum that a policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe v. City of New Bedford*, 155 Mass. 216, 220, 29 N.E. 517 (Mass. 1892) (Holmes, J.). As a result, public officers and employees no longer "may constitutionally be compelled to relinquish the First Amendment rights" in all circumstances. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968); *see also Scarbrough v. Morgan County Bd. of Educ.*, 470 F.3d 250, 260 (6th Cir. 2006) (rationale of public-employee free-speech cases applies to free-exercise cases); *cf. Sherbert v. Verner*, 374 U.S. 398 (1963) (government cannot condition public benefits on accepting Saturday employment if that is contrary to religious faith).

Cases like this necessarily must strike the right balance between the employee's right and the larger public right. *Akers v. McGinnis*, 352 F.3d 1030, 1036 (6th Cir. 2003). Indeed, courts routinely balance rights against each other. *See, e.g., Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833, 874 (1992) (women's right to abortion versus states' right to regulate women's health and interest in the unborn child's life); *Gannett Co. v. DePasquale*, 443 U.S. 368,

398-99 (1979) (criminal defendants' due-process rights versus the media's and the public's freedom of the press). When federal courts strike such balances in specific contexts – especially in areas of judge-made law – the resulting balancing test necessarily appears nowhere in the Constitution. *See, e.g.*, *Casey*, 505 U.S. at 878 (creating "undue-burden" test); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 547-48 (1989) (Blackmun, J., dissenting). Here, the Supreme Court has created a new right to same-sex marriage, recognized that that new right may conflict with religious liberty, but not as yet provided a balancing test for resolving the inevitable conflicts. *Obergefell*, 135 S.Ct. at 2607. This case of first impression therefore requires this Court to strike the right balance between the Clerk's rights and those asserted by the Couples.

B. The Clerk's Rights under Kentucky RFRA Are Enforceable in this Federal Challenge

The Clerk has asserted rights under Kentucky RFRA against compelling her to violate her religious beliefs, but the District Court rejected the use of Kentucky law in that context. *Amicus* Eagle Forum respectfully submits that, given the absence of federal law to resolve the balancing of the Clerk's religious freedom versus the Couples' marriage rights, a federal court should look to state law to balance the sensitive civil rights issues here:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all

> persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause[.]

42 U.S.C. §1988(a).[4] Because existing federal precedents and laws do not guide federal courts on how to balance the rights at issue here, this Court can look to Kentucky RFRA. *See Wilson v. Morgan*, 477 F.3d 326, 332 (6th Cir. 2007). Nothing in Kentucky RFRA is *inconsistent* with federal law.

II. THIS COURT AND THE DISTRICT COURT LACK JURISDICTION TO COMPEL THE CLERK TO ACT AGAINST HER RELIGION

As explained below, the Clerk's constitutional office is entitled to sovereign immunity under Kentucky law, and she may assert that immunity for the first time on appeal or even collaterally after judgment. Nothing in *Obergefell* creates an absolute right to receive marriage licenses in Rowan County – at least not when

[4] As used in §1988(a), "Title 24" includes 28 U.S.C. §1343 and 42 U.S.C. §1983. *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 544 n.7 (1972). Although 28 U.S.C. §1343(4) and 42 U.S.C. §1988(a) do not elevate Kentucky law to an independent federal cause of action, *Moor v. County of Alameda*, 411 U.S. 693, 700-04 (1973), they do allow federal courts to resort to state law, as necessary, to declare the law "not inconsistent with the Constitution… of the United States." 42 U.S.C. §1988(a).

marriage licenses are readily available elsewhere in Kentucky – and the Clerk's even-handed denial of licenses to both same-sex couples and opposite-sex couples easily satisfies the equality principles in *Obergefell*. For that reason, there is no ongoing violation of federal law and thus no basis for sidestepping the Clerk's immunity under the *Ex parte Young* exception to sovereign immunity. In sum, the federal courts have no power to compel the Clerk to act.

A. Sovereign Immunity Denies Federal Courts the Authority to Compel the Clerk to Issue Marriage Licenses

Under the Eleventh Amendment, "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. Sovereign immunity arises also from the Constitution's structure and antedates the Eleventh Amendment, *Alden v. Maine*, 527 U.S. 706, 728-29 (1999), applying equally to suits by a state's own citizens. *Hans v. Louisiana*, 134 U.S. 1 (1890). The Eleventh Amendment bars suits for both money damages and injunctive relief unless the state has waived its immunity or Congress has abrogated immunity under the Fourteenth Amendment. *Alden*, 527 U.S. at 712-16. The test for waiver is "a stringent one," and "consent … must be unequivocally expressed." *Sossamon v. Texas*, 131 S.Ct. 1651, 1658 (2011) (interior quotations and citations omitted). Nothing suggests that Kentucky or the Clerk have waived sovereign immunity.

Under the officer-suit exception of *Ex parte Young*, 209 U.S. 123 (1908), however, sovereign immunity does not bar some suits in which the plaintiff seeks only prospective injunctive or declaratory relief to avert an ongoing violation of federal law. This analysis requires a "straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (interior quotations omitted). In the absence of an ongoing violation of federal law, however, the *Young* exception does not relieve plaintiffs of the defendant's immunity. *Verizon*, 535 U.S. at 645; *accord Diaz v. Mich. Dep't of Corr.*, 703 F.3d 956, 966 (6th Cir. 2013). As explained below, the Couples have not identified an ongoing violation of federal law sufficient to trigger *Young*.

Although the Clerk did not raise sovereign immunity in her stay application, the defense is sufficiently jurisdictional that she can raise it at any time, even on appeal: the "Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court." *Edelman v. Jordan*, 415 U.S. 651, 678 (1974); *Wilson-Jones v. Caviness*, 99 F.3d 203, 206 (6th Cir. 1996). Indeed, sovereign immunity is one of the few jurisdictional arguments that one can raise collaterally to attack an adverse judgment. *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 152-53 & n.6 (2009). For that reason, *amicus* Eagle Forum respectfully submits that, under the circumstances, this Court must consider the

Clerk's immunity: "a federal court *must* examine each claim in a case to see if the court's jurisdiction is barred by the Eleventh Amendment." *Wilson-Jones*, 99 F.3d at 206 (emphasis in original, alterations and internal quotations omitted).

1. Kentucky's Sovereign Immunity Applies to County Clerks

Although county clerks in some states may lack their state's immunity from suit under the Eleventh Amendment, county clerks in Kentucky are immune from suit to the same extent as the state. *Schwindel v. Meade Cnty.*, 113 S.W.3d 159, 163 (Ky. 2003). "County Clerk" is a constitutional office, *St. Matthews Fire Prot. Dist. v. Aubrey*, 304 S.W.3d 56, 60 (Ky. Ct. App. 2009), and indeed "the existence of counties predates the Commonwealth itself." *Lexington-Fayette Urban County Gov't v. Smolcic*, 142 S.W.3d 128, 131 n.1 (Ky. 2004). Further, "when an officer or employee of a governmental agency is sued in [a] representative capacity, the officer's or employee's actions are afforded the same immunity, if any, to which the agency, itself, would be entitled." *Yanero v. Davis*, 65 S.W.3d 510, 522 (Ky. 2001). As such, the Clerk is entitled to Eleventh Amendment immunity from suit.

Although the Couples have styled their suit against the Clerk individually, their request for declaratory and injunctive relief is necessarily a representative-capacity suit: if she left office, the Clerk would be wholly unaffected by declaratory or injunctive relief and would be without power to redress any injury. *Snyder v. Buck*, 340 U.S. 15, 18 (1950). Indeed, suits against officials in their

"individual capacity under color of legal authority" are simply the flip side of representative-capacity suits against them in their "official capacity," where former denies any authority whatsoever for the challenged action taken "under the color of authority." See *Stafford v. Briggs*, 444 U.S. 527, 539 (1980); *cf.* 5 U.S.C. §702, 28 U.S.C. §1391(e) (listing official-capacity and color-of-legal-authority actions as distinct). "Astute practitioners know [to name officers individually], and suits against officers in their personal capacity are likely to be numerous in the future as they have been in the past." Kenneth Culp Davis, *Suing the Government by Falsely Pretending to Sue an Officer*, 29 CHI. L. REV. 435, 453-54 (1962). At least for purposes of injunctive and declaratory relief, the Couples have brought a representative-capacity suit.

2. The Couples Cannot Allege a Violation of Federal Law Sufficient to Invoke the *Ex parte Young* Exception to Sovereign Immunity

Even without the problem of a court's needing to balance *competing federal rights* discussed in Section I.A, *supra*, no marriage-rights decision of the Supreme Court has ever found an absolute right to obtain a marriage license in one's county of residence, especially when marriage licenses are readily available nearby. *Cf. Casey*, 505 U.S. at 874 (significant travel distances for women seeking an abortion do not violate that judge-made right). To the extent that the language of a decision would support that perceived right, that language would be mere *dicta* when the

court did not face that specific question: "cases cannot be read as foreclosing an argument that they never dealt with." *Waters v. Churchill*, 511 U.S. 661, 678 (1994). Accordingly, there is no substantive due-process right to obtain marriage licenses in Rowan County under the Due Process Clause.

Similarly, the Clerk's denying marriage licenses to both same-sex and opposite-sex couples defeats any claim to an equal-protection violation:

> [W]hen the right invoked is that to equal treatment, the appropriate remedy is a *mandate* of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class

Heckler v. Mathews, 465 U.S. 728, 740 (1984) (emphasis in original, interior quotations omitted). The Clerk has adopted an interim solution that, quite frankly, could qualify as a permanent solution under the Equal Protection Clause. The treatment is entirely equal. But even the Clerk does not propose that her interim solution remain in place forever. Instead, her third-party complaint seeks relief from Kentucky that would alleviate the need for her to violate her religious beliefs while enabling Couples (and future couples) to obtain marriage licenses even in Rowan County. *See* Stay Appl. at 14-15. In any event, there clearly is no ongoing violation of the Equal Protection Clause.

Given that there is no violation of the Fourteenth Amendment, the Couples have no basis for sidestepping the Clerk's sovereign immunity to seek prospective

relief to enforce federal law. As such, this Court should remand with orders to dismiss the Couples' suit.

B. The Couples Cannot Establish Redressability Because the Clerk Would Remain Free to Attack this Court's Judgment Collaterally on Sovereign Immunity Grounds

Under *Bailey*, 557 U.S. at 152-53 & n.6, the Clerk remains free to attack a judgment of this Court or the District Court collaterally on immunity grounds if this Court does not resolve the immunity issue. As such, *amicus* Eagle Forum respectfully submits that the Couples will not have established that a federal court can redress their injury unless the immunity issue resolves in the Couples' favor. Without redressability, of course, an Article III court must not render judgment at all. *Wuliger v. Mfrs. Life Ins. Co.*, 567 F.3d 787, 793 (6th Cir. 2009). For that reason, *amicus* Eagle Forum respectfully submits that this Court must address the Clerk's immunity from suit.

CONCLUSION

This Court should stay the District Court's order dated August 12, 2015, pending final resolution of the appeal in this Court.

Dated: August 21, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. The foregoing complies with FED. R. APP. P. 27(d)(2)'s page limits because the brief contains 13 pages excluding the parts of the brief that FED. R. APP. P. 27(d)(2)(exempts.

2. The foregoing complies with FED. R. APP. P. 32(a)(5)'s type-face requirements and FED. R. APP. P. 32(a)(6)'s type style requirements – incorporated by FED. R. APP. P. 27(d)(1)(E) – because the brief has been prepared in a proportionally spaced type-face using Microsoft Word 2010 in Times New Roman 14-point font.

Dated: August 21, 2015

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CERTIFICATE OF SERVICE

I hereby certify that, on August 21, 2015, I electronically filed the foregoing brief – as an exhibit to the accompanying motion for leave to file – with the Clerk of the Court for the U.S. Court of Appeals for the Sixth Circuit by using the Appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Dated: August 21, 2015

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 15-5880 Case Name: Miller v. Davis

Name of counsel: Lawrence J. Joseph

Pursuant to 6th Cir. R. 26.1, Eagle Forum Education & Legal Defense Fund
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on August 21, 2015 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Lawrence J. Joseph

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.